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No. 99-1084

Supreme Court, U.S.
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In The

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

RAYMOND NORRIS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Second Circuit decision finding the requirements of Fed. R. Civ. P. 23(a) satisfied warrants review by this Court where (i) the Petition for the Writ of Certiorari is premature because it addresses decisions of only three other circuits, (ii) the decisions of the four circuits are in harmony, (iii) the Second Circuit decision quotes and follows this Court's Rule 23 decisions, and (iv) the petition is currently moot because, since the Second Circuit's decision on Rule 23(a), the district court has refused to certify the class on 23(b) grounds.

2. Whether a circuit court of appeals, when reviewing a district court's determination of whether plaintiffs have satisfied the commonality requirement of Fed. R. Civ. P. 23(a), may engage in a rigorous analysis of the statistical evidence presented by the parties, while stopping short of resolving the ultimate questions of liability, and overrule the district court's erroneous conclusions based on its less rigorous analysis of the same statistical evidence.

3. Whether an employer can immunize itself from class-based redress of the discriminatory actions engendered by centrally developed and administered company-wide-promotion and disciplinary practices, based solely on the delegation of authority to make subjective decisions.

LIST OF PARTIES

The plaintiff-respondents ("the Class Plaintiffs") are members of the proposed class and seek to represent the class; they are named plaintiffs in two related actions consolidated by the district court: Raymond Norris, Marvin Edwards, Eric Jones, Daniel Canada, Charles Robinson, Sharon Mack, James Oliver, Joan Woodbury, James K. Hunt, Darryl F. Simpson, Elaine Ester, Donald Hines, James Jackson, Cynthia King, Anthony Ellis, Prince Tillery, Helen Perez, Lord Taylor, Dorthea Richardson and Joseph Kimbro.

The defendant-petitioner is Metro-North Commuter Railroad Company ("Metro-North" or "the railroad" or "the company").

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OPINIONS BELOW

Subsequent to the Second Circuit Court of Appeals' decision of July 29, 1999 remanding this case to the District Court and subsequent to defendant-petitioner's submission of its Petition for Writ of Certiorari to this Court, the District Court telephonically advised the parties, on February 18, 2000, that the Motion for Class Certification was denied. The District Court's written opinion is pending.

STATEMENT OF THE CASE

Metro-North is a local commuter railroad operated out of its headquarters in New York's Grand Central Station. It has a centralized, hierarchical structure with a tradition of top-down decision making. The Class Plaintiffs seek reform in Metro-North's company-wide promotion and disciplinary practices to eliminate racial bias.

Following extensive discovery, Class Plaintiffs moved for class certification pursuant to Rule 23. In support of their motion, they submitted a report prepared by Dr. Harriet Zellner (based on multiple regression analyses performed on data files provided by Metro-North), the testimony of Metro-North's own officers, the testimony of a sociologist, and anecdotal evidence. (Pet. App. A-3-4)

Focused primarily on the statistical evidence, the District Court held that Class Plaintiffs had not satisfied the commonality and typicality requirements of Rule 23. The specific issue before the Second Circuit was "whether the [commonality and typicality] requirements of Rule 23(a)

can be met in a Title VII action where the members of the proposed class challenge the subjective components of company-wide policies and procedures governing employee discipline and promotion." (*Id.* A-2) The Second Circuit held that Class Plaintiffs' evidence was sufficient to demonstrate common questions of fact regarding Metro-North's company-wide practices for both promotion and discipline. (*Id.* A-15)

Metro-North's Company-wide Promotion Practices
(*See, generally,* Pet. App. A-5-6)

Metro-North's policy for filling management positions is to promote from within rather than recruit externally, and between 60% and 80% of management positions are filled in this manner. Metro-North's declared promotion procedure requires the posting of all open management positions. The Personnel Department is the sole watchdog for the posting process. It oversees posting, receives and reviews applications, and maintains the Job Title Guidelines and Grade Structure. The Personnel Department assembles a list of qualified candidates, but the manager of the department filling the vacancy makes the final decision. The manager is directed to "hire the most qualified candidate;" no other instructions are given.[1]

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[1] The Assistant Director of Employment admits that Metro-North managers are not held accountable for failure to apply criteria in a systematic and unbiased manner in their personnel decisions, and that she (the Assistant Director) is under no duty to report such violations. In addition, the Personnel Director described the official job requirements on job postings as "overblown" and "overstated," and believes that reassessment

For some vacancies at Metro-North, it is understood in advance that a favored candidate will receive a particular job, even though it is posted. In some instances, the identities of the individuals to be promoted are made known before the positions are posted.[2] Thirty percent of the positions that should be posted are not, which accounts in part for racial bias in promotions. A single Metro-North official, the Personnel Director, must approve the filling of positions without posting.

Also, about 200 union positions at Metro-North are not governed by the formal promotion practices. Called "partially excepted positions" and "agreement supervisors," union workers regard these jobs as desirable positions that may facilitate progress into management. Promotion decisions for these jobs are, as a matter of company-wide policy, left entirely to the individual manager's discretion. An example is the experience of named class representative Joseph Kimbro, an African-American Crew Dispatcher. Kimbro applied for and was denied

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of those requirements would promote racial and gender diversity at Metro-North, a view shared by the Executive Vice President.

[2] The Metropolitan Transit Authority Inspector General, in a 1993 report, found that Metro-North failed to adhere to its posting requirements. The report detailed numerous incidents of pre-selection, favoritism and disregard for the posting requirements, including a "pattern" of favoritism and a "willful" violation of company rules by Vice President Firnhaber, the second highest-ranking executive at Metro-North and supervisor of the Personnel Director. Firnhaber told the Investigator that "she wasn't concerned with Metro-North regulations and procedures regarding job postings, background requirements, or interview procedures."

promotion to the "partially excepted position" of Chief Crew Dispatcher. Metro-North promoted four Caucasians that Mr. Kimbro trained, all with less experience than Mr. Kimbro, to Chief Crew Dispatcher positions in early 1996.

A Metro-North executive testified that the railroad "historically has been male and white." Internally produced reports that Metro-North submits to the Federal Transit Administration show vast underutilization of African-Americans in five of the eight EEO job categories applicable to Metro-North.[3] In the skilled-craft category, based on Metro-North's availability analysis, African-Americans would be expected to fill 58.8% of the 3,356 jobs, but they held only 15%.

The company's data show that African Americans continue to be under-represented in management positions and in the railroad's workforce from which most promotions to management are made. Of the 324 employees in the EEO 'A' level job group, only 21 are African-American. Workforce Diversity Director Mitchell believes African Americans are underutilized in management, and a senior Metro-North recruiter complained to Mitchell that "there were no or hardly any black foremen."

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[3] Metro-North performs an "availability analysis," which is "a comparison of the participation rates of minorities and women at various levels in the work force with their availability in relevant labor markets." Metro-North's availability analysis reports weight the census figures for the job categories of skilled craft, protective service, para-professionals and service/maintenance for the availability of qualified transit workers in the New York City area.

Metro-North's Company-wide Disciplinary Practices *(See, generally,* Pet. App. A-4-5)

Metro-North's progressive disciplinary system ("the Progressive Disciplinary System" or "PDS") applies to all of its approximately 5,000 union employees wherever they work at the railroad. All of the collective bargaining agreements in effect at the company use this company-wide PDS; the agreements contain the same basic provisions for the filing of disciplinary charges, the holding of disciplinary hearings and the assessment of punishment, if any. In the words of the railroad's primary Trial and Appeal Officer, "[t]hey're all held the same. The only difference in the different contracts is basically notification and time limits . . . . The manner in which the actual hearing is conducted is identical for the sixteen unions."

All management personnel deposed acknowledged that disciplinary decisions are made under the railroad's one, standardized, company-wide set of procedures, developed and overseen by the centralized Labor Relations department. Two Metro-North employees hold the title Trial and Appeal Officer, although at times other managers function as hearing officers. The railroad centrally trains its hearing officers in sessions that Labor Relations coordinates and the Director personally attends. All trainees receive the Metro-North Commuter Railroad Hearing Officers' Manual. One officer alone holds the hearings for the three departments that employ most of the railroad's union employees. The Vice President of Administration acknowledged that a non-white hearing officer was "probably something [Metro-North]

should have," and the Personnel Director suggested designating one, but the company undertook no effort to do so.

According to the PDS, "charges" against employees are initiated by the supervisor; the assigned hearing officer then reviews the matter with the Labor Relations Department and formulates the charge, which must be approved by the employee's department head. At the hearings, the hearing officer selects the witnesses and conducts the examination. The transcript goes back to the employee's department head who determines punishment, if any. All appeals go to Labor Relations.

At least since 1993, Metro-North's internal quarterly reports have consistently shown enormous racial disparities produced by the PDS. Workforce Diversity Director Mitchell, in a memorandum he sent to the Vice President of Human Resources in 1994, "expressed concern about the ratio of disciplinary cases involving people of color, particularly African-American." Mitchell expressed this concern on other occasions to Labor Relations Director Burney and railroad President Nelson. Burney admits that he was aware of Mitchell's concern that racism was affecting discipline decisions and that the hearing officers needed additional training on that issue.

Mitchell's department never distributed to hearing officers literature addressing equal treatment in discipline. Furthermore, the degree to which other employees charged with the same offense have been disciplined is not examined. Burney's department never considered adopting policies concerning equal treatment in the PDS.

The Parties' Statistical Evidence

The Circuit Court opinion outlined "The Experts' Reports." (Pet. App. A-6 to A-9) Among other findings, the Appellate Court observed that:

1. Class Plaintiffs' expert, Dr. Zellner, analyzed the computer files provided by Metro-North using numerous multiple regression analyses, controlling for relevant factors, and consistently finding that being Black had highly statistically significant adverse effects on promotion rates and discipline rates. (*Id.* A-6 to A-7)

2. Dr. Zellner's regression analyses showed that being Black reduced an employee's likelihood of promotion **by approximately 33 percent**. With respect to disciplinary charges, Blacks on average faced 3½ times the number of charges compared to Whites. (emphasis added) (*Id.* A-7)

3. The Appellate Court found that "**Significantly,** [Metro-North's expert, Dr.] **Evans did not perform any regression analyses** in reaching his conclusions; instead, he **simply tallied numbers** of disciplinary actions and **made some basic comparisons.**" (emphasis added) (*Id.* A-8)

4. The Court noted that Evans' primary criticism of Zellner's report was that she did not perform her review department-by-department or position-by-position. (*Id.* A-7) However, unlike the District Court below, which overlooked Zellner's response in a supplemental report and affidavit, the Appellate Court observed that Zellner "prepared a department-by-department comparison of the number of job titles in which Blacks and Whites,

respectively, had higher discipline rates" and "performed department-by-department regression analyses to estimate the effect of being Black on the number of disciplinary charges within each department." (*Id.* A-9) These analyses showed, *inter alia*, that "Blacks had higher discipline rates **in 48 positions**," the positions where most of the relevant (union) employees worked. (emphasis added) (*Id.* A-9)[4]

Class Plaintiffs' brief to the Second Circuit, supported by the record, made the following additional relevant observations:

1. Typical of Evans' misleading statements, he "pointed out that of 37 particular departments at Metro-North, no disciplinary action was taken in 25 of them . . . " (*Id.* A-8.) and on that basis claimed that company-wide discrimination could not exist. However, a staggering 98.5% of the workforce subject to the railroad's disciplinary practice (the unionized employees) worked in the 12 large departments where disciplines occurred, and the 25 small departments with no disciplines employed only 1.5% of the relevant workers.

2. Regarding promotion, Evans found a highly statistically significant, negative correlation between being

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[4] Incredibly, Metro-North claims that Zellner "did not endeavor to perform any statistical analyses for particular departments or other subgroups of Metro-North." (Pet. 7) Zellner's comparisons of discipline by job titles within departments and department-by-department regression analyses were provided to Metro-North and the District Court in affidavit form and to the Circuit Court as part of the Record on Appeal. The Circuit Court discusses these analyses in its decision. (*Id.* A-9, A-15 to A-16)

Black and being promoted at the railroad – before he excluded "non-promotable positions." (*See Id.* A-8 definition of "non-promotable": positions for which the rate of promotion was less than one percent.) Because Evans' assessment of non-promotable positions was based on a faulty analysis, he excluded positions for which the actual promotion rate was more than one percent; these excluded positions skewed his results because they included positions where African Americans were promoted at a much lower rate than Whites.

3. Regarding discipline, Evans reported that different Metro-North positions have materially different rates of discipline, but he included in his analysis 12 management positions, such as Director, Assistant Director, and Manager, that are not subject to Metro-North's disciplinary practice.[5] Of course, the rate of discipline for these 12 positions was zero. Besides obvious errors like these, Evans did not take into account in any statistical analysis the differences that he claimed to have found. Instead, he simply pointed to these alleged differences and asserted in conclusory fashion that, therefore, no statistically significant racial disparities could be established.

4. Zellner's analyses were focused on whether the alleged disparities in promotion and discipline: (i) manifested themselves when relevant factors were controlled; (ii) if so, whether the disparities occurred on a class-wide basis; and (iii) whether the disparities pervaded all areas of the railroad. In addition to the supplemental report

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[5] Zellner, on the other hand, analyzed discipline among union employees only, which is the correct approach.

and affidavit in which Zellner examined employees by job title within department and performed 10 separate regressions on each of the 10 major departments at the railroad, she had "controlled for" department in her original company-wide regressions.

The Decision of the Court of Appeals for the Second Circuit

A. Regarding the Statistical Evidence

Petitioner has misrepresented, or at the very least grossly misinterpreted, the contents of the Circuit Court's decision. Contrary to petitioner's assertions in its statement of the case and in its argument point II, the Circuit Court did not conclude that the District Court could not evaluate the statistical evidence at the class certification stage.

To the contrary, the Circuit Court: (i) quoted and followed this Court's requirement from *General Telephone v. Falcon*, 457 U.S. 147, 161 (1982), that courts perform a "rigorous analysis" to determine whether Rule 23's requirements are satisfied; (ii) followed this Court's directives concerning the proper function of statistics in class-wide discrimination claims;[6] and (iii) in fact,

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[6] For example, adhering to the principles announced by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977), the Second Circuit observed that "[w]here the decision-making process is difficult to review because of the role of subjective assessment, significant statistical disparities are relevant to determining whether the challenged employment practice has a class-wide impact." (Pet. App. A-15)

performed its own analysis of the statistical evidence that was much more accurate than the District Court's. The Circuit Court saw details that the District Court overlooked, such as the many shortcomings of Evans' report – including the fact that it failed to utilize multiple regressions but only relied on **simple tallies and basic comparisons** – and the fact that Zellner submitted a supplemental report addressing the very criticisms raised by Evans. Not unduly leaning toward one side, the Circuit Court's opinion also took account of Evans' principal criticisms of Zellner's report. (Pet. App. A-6 to A-10, A-15 to A-16)

More specifically, the Circuit Court analyzed the competing expert reports to determine whether sufficient, reliable evidence of significant statistical disparities that supported commonality was proffered:

1. The Court provided a three-page summary of the experts' reports that reflects a much more thorough examination of the statistical evidence than the District Court's performed. (*Id.* A-6 to A-9)

2. The Court quoted Zellner's explanation of her methodology in choosing the dependent variable and five independent variables for the regressions on disciplinary charges and discussed the independent variables in the regressions on promotion. (*Id.* A-6-7)

3. The Court cited Zellner's findings of gross disparities and their high degree of statistical significance. (*Id.* A-7)

4. After quoting Evans' conjecture that named plaintiffs' experiences of discrimination would prove to

be "typical of only a fraction of the Metro-North workforce" if an examination by position were prepared (*Id.* A-7-8), the Court detailed the findings of Zellner's position-by-position analyses: disparities were found in the 48 positions where 4,266 of the 4,809 relevant workers were employed. (*Id.* A-9)

5. Based on its in-depth analysis, the Circuit Court criticized the District Court's reliance on Evans' report. (*Id.* A-15 to A-16)

Overruling the District Court, the Circuit Court held that "this [Zellner's] report, in conjunction with the anecdotal evidence, satisfies the Class Plaintiffs' burden of demonstrating commonality for purposes of class certification." (*Id.* A-16) Read plainly, the Second Circuit's decision credited the analyses prepared by Zellner over those submitted by Evans; the Court's conclusions contain statistics supplied by Dr. Zellner:

> [T]he Class Plaintiffs' statistical evidence supports a finding of commonality on the issue of discipline with respect to those African-American employees who were disciplined while working in one of **the 48 positions** in which African-Americans are more likely to be disciplined than Whites. In addition, the statistical evidence supports a finding of commonality on the promotion claim. . . . [B]eing Black reduces an employee's likelihood of being promoted **by approximately 33 percent**. In conducting her analyses, the Class Plaintiffs' expert controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action and promotion. The[ ] statistical disparities are

not insignificant. (citation omitted) (emphasis added) (*Id.* A-15 to A-16)

B. Regarding Metro-North's Company-Wide Promotion and Disciplinary Practices

The Second Circuit found that Metro-North has company-wide promotion and disciplinary practices that apply to all relevant employees, wherever employed at the railroad. (*Id.* A-4-6) The Circuit Court also held that the delegation to supervisors, pursuant to company-wide policies, of authority to make subjective decisions does not preclude class certification. The Court concluded that commonality and typicality *can be met* where plaintiffs challenge the subjective decision making in company-wide policies and procedures *only if* plaintiffs show that the challenged practices are causally related to a pattern or practice of discrimination or has a disparate impact. Finally, the Court held that those requirements were met in this particular case. (*Id.* A-2-3, A-13-15)

The District Court's Decision

The District Court denied Class Plaintiffs' Motion for Class Certification primarily on the basis of its cursory review of the statistical evidence. Metro-North agrees that in reaching its conclusion that plaintiffs failed to show commonality, "the District Court focused primarily on the statistical evidence." (Pet. 10)

The District Court relied entirely on Evans' criticism of Zellner's report. The District Court must have overlooked Zellner's department-by-department regression analyses and position-by-position analyses because the

Court failed even to mention, favorably or unfavorably, these thorough-going answers contained in Zellner's supplemental affidavit.

REASONS FOR DENYING THE WRIT

The Writ should be denied because there is not a grain of merit to the petitioner's contention that there is a split among the circuits, because the Petition is premature, and because the Petition is currently moot.

Petitioner's principal contention appears to be that the Second Circuit's decision is in conflict with the decisions of other Circuits. Despite Petitioner's rhetoric, however, there is no "existing split" that the Second Circuit's decision, in petitioner's works, "has deepened." (Pet. 14) The Petition cites authority from only three circuits – the Fourth, the Fifth, and the Eighth – which can hardly be regarded as a comprehensive reckoning of how the various Circuits are treating Rule 23. Simply put, the Petition is premature at this time.

There is also no merit to petitioner's claim that the Second Circuit's decision is in conflict with those of the Fourth, Fifth, or Eighth Circuits. The Fourth and Eighth Circuit authorities are distinguishable, almost without effort, on their facts, and the Fifth Circuit case petitioner cites is a 1980 decision actually cited by the Second Circuit in its decision. Most critically of all, the Second Circuit's decision quotes and adheres to the basic principles announced by this Court in such cases as *General Telephone v. Falcon*, 457 U.S. 147 (1982) and *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

Petitioner also claims that this Court's review is required because the Second Circuit's decision embraces a theory of class actions that is novel, unprecedented, and that could open the floodgates to widespread unwarranted class action litigation. Here again, petitioner engages in mere hyperbole. Consistent with authority from this Court and other Circuits, the Second Circuit held that delegating to supervisors, pursuant to company-wide policies, the authority to make subjective decisions may give rise to a common question if sufficient evidence, including the showing of a causal connection, is presented.

Petitioner's other contention is that the Second Circuit's decision somehow precludes district courts from performing a careful review of statistical evidence before certifying classes. On this point, the Petition appears to plainly misrepresent to this Court the contents of the Second Circuit's decision. The ruling does not "compel" class certification (Pet. 14) under any circumstances, not even in this case, where the Circuit Court remanded for further consideration and the District Court has, since, denied class certification again.

Because the Second Circuit ruling is in accord with the rulings of this Court and other circuit courts, petitioner has failed in its attempt to identify and delineate a conflict, and this Court should deny the Petition for Writ of Certiorari.

ARGUMENT

I. THE SECOND CIRCUIT'S RIGOROUS ANALYSIS OF THE STATISTICAL EVIDENCE AND ITS USE OF THAT ANALYSIS IN DETERMINING WHETHER PLAINTIFFS SATISFIED RULE 23(a) COMMONALITY AND OVERRULING THE DISTRICT COURT ARE IN ACCORD WITH RULINGS BY OTHER CIRCUIT COURTS.

A. The Second Circuit's Rigorous Analysis Of The Statistics Sets An Appropriate Example For District Courts To Follow.

Metro-North imaginatively claims that due to the Second Circuit's decision in this case "district courts would now be obliged to accept at face value the statistical arguments advanced by the plaintiffs in support of a class certification motion, regardless of how unpersuasive these arguments would be found if analyzed more closely." (Pet. 21) Petitioner clearly misreads the Second Circuit's decision.

Petitioner's contention is especially ironic here because the Circuit Court performed a more "rigorous analysis" (*General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982)) of the statistical evidence than the District Court. It was the District Court that "accept[ed] at face value the statistical arguments advanced by the [defendant]" in this case. (Pet. 21) *See* decision of the Court of Appeals (Pet. App. A-6 to A-9 and A-15 to A-16); Memorandum Order of the District Court (Pet. App. A-30 to A-31).

The Second Circuit discussed both experts' reports at length and drew conclusions about their quality and persuasiveness. (*Id.* A-6-9, A-15-16) The Court described the

criticisms leveled against Zellner's report (on behalf of Class Plaintiffs) by Evans (on behalf of Metro-North) and explained how Zellner's supplemental report and affidavit answered Evans' criticisms. (*Id.*) Unlike the District Court, the Circuit Court recognized that Zellner re-ran the discipline regressions separately for each of the ten major departments at Metro-North and separately prepared comprehensive analyses by job title within department. (*Id.* A-9)[7]

Metro-North also claims that the Appellate Court confused class certification determination with the merits. Quite the opposite, the Court expressly stated that the statistics needed at trial will likely be different, "more detailed," and concluded that Zellner's report, along with other evidence, satisfied the burden of demonstrating commonality for purposes of class certification. (*Id.* A-16) Moreover, the Court criticized the District Court for relying on Evan's statistical report, specifically referring to Evans' attempt to refute Zellner's reports on the basis of different rates of discipline and promotion in different positions. (*Id.* A-15) Noting that Evans' criticisms might be more fruitful on the merits, the Circuit Court

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[7] Metro-North never met its burden of proving that Zellner should have controlled for additional variables. Under *Bazemore v. Friday*, 478 U.S. 385, 404 n.14 (1986), to disprove Dr. Zellner, it is not enough for Metro-North merely to name variables that Zellner should have taken into account; the railroad must show that regression analyses accounting for those variables would eliminate the disparities. *Accord Sobel v. Yeshiva University*, 839 F.2d 18 (2d Cir. 1988); *Churchill v. Int'l Business Machines, Inc.*, 759 F. Supp. 1089, 1092-93 (D.N.J. 1991). Metro-North has performed no such analysis.

explained in detail that Zellner's "statistical evidence supports a finding of commonality on the issue of discipline . . . [in] the 48 positions" identified by Zellner and "on the promotion claim." (*Id.* A-15-16)

Thus, the Circuit Court re-examined the statistical evidence submitted by the parties in this case and concluded that Class Plaintiffs' evidence was persuasive on the issue of class certification. (A-6 to A-9, A-15 to A-16)

B. The Second Circuit's Ruling Is In Accord With Rulings By Other Circuit Courts.

The cases cited by Metro-North are in accord with the Second Circuit's decision here. The courts in those cases analyzed the statistical evidence and rejected "raw" statistics and weak numerical presentations, similar in nature to Evans' report (on behalf of Metro-North) in this case. Like those courts and unlike the District Court below, the Second Circuit analyzed *all* of the statistical evidence and examined it in depth.

Metro-North cites *Chaffin v. Rheem Manufacturing Co.*, 904 F.2d 1269 (8th Cir. 1990), which is not analogous to this case because the Eighth Circuit emphasized the fact that the lone plaintiff had failed to identify any other class member alleging discrimination. Nevertheless, although the statistics were not central to its decision, the Eighth Circuit Court was satisfied with the District Court's finding that plaintiff's statistical evidence was "too bareboned." *Id.* at 1276. The plaintiff had simply tallied the 72 promotions made in the relevant period and compared the two promotions received by members of the proposed class to the four or five promotions that

they might have expected if they were being promoted in proportion to their representation in the available pool of candidates. *Id.* at 1275.

Like the *Chaffin* court, the Second Circuit here found that the statistics proffered *by Metro-North* – not those by Class Plaintiffs – were too bareboned. The Court found that "[s]ignificantly, Evans did not perform any regression analyses in reaching his conclusions; instead, he simply tallied numbers of disciplinary actions and made some basic comparisons." Pet. App. A-8. On the other hand, the Court noted with approval that Zellner utilized "numerous multiple regression analyses," Pet. App. A-6, and "controlled for various factors that one would expect to be relevant . . . ." *Id.* A-16.

In its comments on *Chaffin*, Metro-North claims that "[t]here, as here, the plaintiff relied on statistical evidence comparing the percentage of promotions awarded . . . with the expected percentage based on the overall African-American population in the department at issue." (*Id.* 22-23) However, the simple numerical presentation provided by the plaintiff in *Chaffin* is no different in kind from the simple tallies and basic comparisons presented by Metro-North here. Like the Second Circuit here, the Eighth Circuit in *Chaffin* rejected a barebones statistical approach.

In citing *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), Metro-North highlights a case that is actually in accord with the Second Circuit's decision here because the Fourth Circuit was not persuaded by the simple tallies and basic comparisons provided by plaintiffs, just as the Second Circuit was not persuaded

by Evans' (Metro-North's) simple tallies and basic comparison. In *Stastny*, four plaintiffs, all from one office, sought to represent a class of employees from all 24 autonomous facilities spread across the state of North Carolina. Plaintiffs' "statistical" evidence was limited to simple company-wide totals that suggested women in management were concentrated in lower levels. *Id.* at 270.

Unlike the plaintiffs in *Stastny*, Class Plaintiffs here presented statistical analyses consisting of many multiple regressions controlling for relevant factors and answering the concerns raised by Metro-North's expert. Indeed, there is no difference between the approach required by the Second and Fourth Circuits in analyzing statistical evidence for class certification determinations. As shown by this case and *Stastny*, both circuits find simple tallies and comparisons unpersuasive.

Also, the *Stastny* court pointed out that a statewide pattern or practice could be shown even in a dispersed multi-facility setting, perhaps by statistical data showing disparities at a sufficient number of the separate facilities. *Id.* at 278. Here, although Metro-North is a local commuter railroad with a hierarchical structure that requires all locations to report functionally up to its headquarters in Grand Central Station and to apply uniform company-wide practices, Class Plaintiffs have shown that racial disparities occur department by department and in the 48 individual positions where most of the relevant employees work.

Metro-North cites some cases that are clearly not analogous here because they involve no statistics or extremely simple numerical presentations and cites other

cases that are helpful to Class Plaintiffs. *See, e.g., Gonzalez v. Brady*, 136 F.R.D. 329 (D.D.C. 1991), where plaintiffs offered no statistics regarding their discipline claim and in support of their promotion claim offered simple comparisons (like Evans's data on behalf of Metro-North here); *Danielson v. Fletcher*, 132 F.R.D. 489 (N.D. Ohio 1990), where the lone *pro se* plaintiff offered allegations and no evidence; *Ross v. Nikko Secs. Co.*, 133 F.R.D. 96 (S.D.N.Y. 1990) (*Ross II*), where plaintiffs presented "no systematic statistical evidence" (quoting *Ross v. Nikko Secs. Co.*, 53 Fair Empl. Prac. Cas. 1121, 1125 (S.D.N.Y. 1990) (*Ross I*)); *Price v. Cannon Mills*, 113 F.R.D. 66 (M.D.N.C. 1986), where the only numerical evidence presented were tallies showing that workers were 80% female, supervisors were 50% female and managers were 87.5% male; *Harris v. Marsh*, 100 F.R.D. 315, 323 (E.D.N.C. 1983), where defendants "compellingly" demonstrated that no class existed; and *Ray v. Phelps Dodge Brass Co.*, 35 Fair Empl. Prac. Cas. (BNA) 1004, 1007 (N.D. Ala. 1983), where the four plaintiffs proffered only their individual complaints and "speculative allegations."

Metro-North cites cases in which courts denied class certification "where the statistical evidence offered in support of the motion could not withstand [a] 'rigorous analysis.' " (Pet. 22) Of course, when it is the defendant's statistical evidence that fails a "rigorous analysis," and plaintiffs' statistical evidence proves to be reliable and sufficient, courts can and do find in favor of plaintiffs. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *Capaci v. Katz & Besthoff, Inc.*,

711 F.2d 647, 650-56 (5th Cir. 1983); *E.E.O.C. v. Sheet Metal Workers' Int'l*, 889 F. Supp. 642 (S.D.N.Y. 1995).

II. THE SECOND CIRCUIT'S HOLDING THAT COMPANY-WIDE PRACTICES WHICH INCLUDE DELEGATION OF SUBJECTIVE DECISION MAKING DO NOT PRECLUDE CLASS CERTIFICATION IS IN ACCORD WITH THE RULINGS OF OTHER CIRCUIT COURTS.

Metro-North misstates the potential consequences of the Second Circuit's holding in this case; the opinion did not *require* certification under any circumstances. Rather, the Circuit Court held only that "the requirements of Fed. R. Civ. P. 23(a) **can be satisfied**" where plaintiffs challenge "the delegation to supervisors, pursuant to company-wide policies, of the authority to make subjective decisions," (Pet. App. A-3), only if plaintiffs show a causal connection, (*Id.* A-15). (emphasis added)

Even more fundamental to the Petition for Writ of Certiorari before the Court, Metro-North grossly exaggerates any alleged 'divergence of opinion' among the circuits on the issue of class certification under the disparate treatment and disparate impact theories. Regarding disparate treatment, petitioner cites one, distinguishable Fourth Circuit case from 1980, *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, and a Fifth Circuit case, *Shipes v. Trinity Indus.*, 987 F.2d 311 (5th Cir.), *cert. denied*, 510 U.S. 991 (1993), that the Second Circuit itself cited in support of its ruling and Class Plaintiffs cited in their brief below. Regarding disparate impact, Metro-North only cites the same Fourth Circuit case and *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994), *cert. denied*, 513

U.S. 1149 (1995). The Fifth Circuit Court reviewed *Anderson* on the merits, and the *Anderson* plaintiffs had proceeded to trial after the district court granted their motion for class certification. Thus, instead of the "rift" among the circuits that Metro-North trumpets to the Court, the three cases petitioner relies on are more analogous to a crack in the sidewalk. Moreover, the district court cases that Metro-North cites add nothing significant to their argument.

A. The Second Circuit's Ruling On Disparate Treatment Is In Accord With Rulings Of Other Circuits.

Metro-North cites *Stastny v. Southern Bell Tel. & Tel. Co.*, for the proposition that class certification should be denied if alleged discriminatory practices are "decentralized." The facts in *Stastny*, however, are quite different from the facts here. The four *Stastny* plaintiffs all worked in one office but sought to represent a class of all women in management working in all 24 widely dispersed and locally autonomous facilities across the state of North Carolina. *Id.* At 278-79. While upholding the liability findings for the four named plaintiffs, the Circuit Court reversed the statewide class certification, emphasizing that "[t]here was no showing by direct evidence that a statewide practice or policy, either objectively or subjectively administered, existed." 628 F.2d at 279.

Here, as the Second Circuit found, there are company-wide practices and policies for both promotion and discipline. (Pet. App. A-3-5) In fact, there are *no* aspects

of the practices in promotion or discipline at Metro-North that are *not* standardized and applied company-wide.

Having failed to find a substantive conflict among the circuits, Metro-North reverts to arguing the facts of this case. Reiterating at every opportunity its claim to be "decentralized," – and asserting that the record supports its view when the record clearly shows Metro-North is centralized – petitioner tries to separate itself from the reality that its company-wide practices regarding promotion and discipline emanate from and are administered by a few highly centralized executives. Metro-North argues that the "defect" fatal to the Class Plaintiffs is their alleged "failure to attribute the alleged discriminatory conduct to some or all of the hundreds of supervisors responsible for individual promotion and discipline decisions to a centralized discriminatory practice or policy." (Pet. 15) However, Class Plaintiffs have shown exactly that: the discriminatory conduct *is* attributable to a centrally developed Metro-North policies implemented company wide.

Fifth Circuit and Second Circuit cases are in accord. For example, in *Bradford v. Sears Roebuck and Co.*, 673 F.2d 792 (5th Cir. 1982), wholly separate operating procedures and policies existed for each of the several formal groups into which the 46 Sears outlets in the state were divided. Metro-North, by contrast, does not contend that it maintains department-specific discipline or promotion policies. Similarly, in *Coser v. Moore*, 739 F.2d 746 (2d Cir. 1984), there were real, meaningful, department-specific hiring criteria among different academic and other departments at Stony Brook. (The facts are fully set forth in the district court's decision, *Coser v. Moore*, 587 F. Supp.

572 (E.D.N.Y 1983)). By contrast, the promotion and discipline policies and practices are the same *in every Metro-North department.*

Metro-North also relies on *Appleton v. Deloitte & Touche,* 168 F.R.D. 221 (M.D. Tenn. 1996), where plaintiffs sought certification of a nationwide class of technical and other support staff who worked in 45 offices of this public accounting firm. However, each managing partner of those offices had autonomy to develop unique employment practices. Moreover, plaintiffs mounted an old-style "across-the-board" challenge but offered only general statistics indicating under representation. The District Court denied certification because decisions were made entirely at the local level, pursuant to each local office's own policies, and because plaintiffs' statistics were not developed separately for their hiring, promotion, compensation, and other claims.

In contrast, here, Metro-North's promotion and discipline practices are centrally administered and do not vary by department or locale. Class Plaintiffs demonstrated that there are centrally administered practices in place to govern promotion and discipline with significant involvement of high level management and a small number of centralized executives in Personnel and Labor Relations who administer those practices out of their offices in Grand Central. (Pet. App. A-4-6)

Metro-North also cites *Roberts v. Marine Midland Bank,* 22 Fair Empl. Prac. Cas. (BNA) 326 (S.D.N.Y. 1979), where the court certified a class represented by only one plaintiff who alleged discrimination in promotion at one branch of the bank. The court granted certification for the

bank's Eastern Region, *the level of organization at which employment practices were administered*. Applying the same reasoning here, class certification at the company-wide level would be appropriate.

Metro-North cites other cases that are distinguishable because the challenged practices were not centrally administered. For example, in *Wells v. General Electric Co.*, 78 F.R.D. 433 (E.D. Pa. 1978), a lone plaintiff sought to represent all African-American management employees at all 2,500 facilities of this international company. *See also Brooks v. Circuit City Stores, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 102 (D. Md. 1996), where plaintiffs from Maryland sought to represent a nationwide class; *De La Fuente v. Chicago Tribune Co.*, No. 84 C 4596, 1985 U.S. Dist. LEXIS 17512 (N.D. Ill. July 24, 1985) (unpublished decision), where a lone plaintiff sought to represent all non-white employees in an old-style "across-the-board" challenge; *Williams v. New Orleans Pub. Serv., Inc.*, 30 Fair Empl. Prac. Cas. (BNA) 1127 (E.D. La. 1982), where no company-wide practices were alleged, *different departments internally set their own policies*, developed and administered their own training programs, et cetera, and some were unionized while others were not; and *Harrison v. Simon*, 91 F.R.D. 423 (E.D. Pa. 1981), where the two plaintiffs offered only their individual complaints as evidence.

In sum, the critical feature in each of the cases Metro-North cites is the absence of a centrally-administered policy pursuant to which employment decisions were made.

B. The Second Circuit's Ruling On Disparate Impact Is In Accord With Rulings Of Other Circuits.

Metro-North's premise is that delegation to supervisors, pursuant to company-wide policies, of the authority to make subjective decisions about discipline and promotions somehow precludes a claim that there is a pattern or practice of racial discrimination in those delegated decisions, but that premise is factually and legally erroneous.

Factually, the subjectivity at the end of the Metro-North chain of command is the result of a company-wide policy of not supervising the delegees and not holding them accountable for racial bias in their decisions. The evidence shows, as the word "delegation" itself denotes, that the discretionary authority exercised in promotion and disciplinary decisions did not arise *sua sponte* but was bestowed by management, and does not exist randomly but dwells company-wide within every Metro-North employee who disciplines or promotes other Metro-North employees.

It is well established, in this Court's words, that disparate impact analysis "is in principle no less applicable to subjective employment criteria than to objective or standardized tests." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988). It is equally well established in the class certification context that "subjectivity" is no bar to commonality, provided there exists an overarching, company-wide policy that addresses the individual supervisors' decisions. *See, e.g., Falcon*, 457 U.S. at 159, n. 15; *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598-99

(2d Cir. 1986); *Barefield v. Chevron, U.S.A., Inc.*, 44 Fair Empl. Prac. Cas. (BNA) 1885, 1887-89 (N.D. Cal. 1987) (commonality found where managers made subjective promotion decisions but were controlled by uniform centralized management organization that oversees promotions); *Shipes*, 987 F.2d at 316; *Larkin v. Pullman Standard Div., Pullman Inc.*, 854 F.2d 1549, 1555 (11th Cir. 1988). In *Shipes*, the Fifth Circuit upheld the district court's certification of a class encompassing two different plants where: supervisors used subjective decision making; employees were transferred between the two plants; the plants "had the same insurance plan, retirement programs, administrative forms; and the two plants used the same Hourly Employee Handbook." *Shipes*, 987 F.2d at 316.

Metro-North relies on *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277 (5th Cir. 1994), *cert. denied*, 513 U.S. 1149 (1995). In *Anderson*, decided after trial on the merits, the Circuit Court upheld the district court's decision to apply a disparate treatment analysis to plaintiffs' claims and not to apply a disparate impact analysis. However, the Circuit Court said nothing that would conflict with the Second Circuit's ruling here. The Fifth Circuit, like the Second, noted that "class action plaintiffs may challenge subjective or discretionary employment practices under the disparate impact model, *Watson*, 487 U.S. at 990 . . . ." In another on-the-merits case, *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364 (2d Cir. 1989), challenging hiring under the ADEA, the court upheld the district court's refusal to give the jury a disparate impact charge on facts very different from those in this case. Most significantly, eight of the 13 people hired were over 40 years of age,

while a majority of those in the applicant pool were under 40. Again, this is not in conflict with the Second Circuit's decision here.

Metro-North cites other cases where there was "no showing that the challenged decisions were traceable to a concrete practice or policy that applied to all class members." For example, in *Stambaugh v. Kansas Dep't of Corrections*, 151 F.R.D. 664 (D.Kan. 1993), commonality was not found for several reasons, including the autonomy of each warden to make promotion decisions, a fact conceded by plaintiffs who were all from one facility seeking to represent a state-wide class covering many facilities dispersed throughout the state of Kansas. Similarly, in *Stastny* and *Appleton*, local autonomy was critical to the courts' decisions. Metro-North also cites *McCree v. Sam's Club*, 159 F.R.D. 572 (M.D. Ala. 1995), where plaintiffs offered almost no evidence; they even failed to meet the numerosity requirement.

In sum, the cases that petitioner cites are inapposite here because the concrete promotion and disciplinary practices challenged by Class Plaintiffs *do* apply to all class members and are uniformly administered by centralized executives at the railroad's headquarters. (Pet. App. A-4-6) (See discussion above.)

III. THE PETITION IS PREMATURE AND MOOT.

As discussed above, the issues petitioner seeks to have this Court review have not sufficiently percolated in the Circuit Courts, as Metro-North points to decisions from only three circuits other than the Second. Even

assuming, arguendo, that there were disagreement among those four circuits, it is simply too early for this Court to review the issues raised.

Additionally, the District Court, subsequent to the Second Circuit decision finding that the requirements of Rule 23(a) were satisfied, telephonically advised the parties that it was denying class certification, presumably on Rule 23(b) grounds. Thus, review by this Court at this time would be inappropriate, as it would result, essentially, in the issuance of an advisory opinion.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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